Summary of SC98077, *In the Matter of the Care and Treatment of D.N. v. State of Missouri*
Appeal from the Clark County circuit court, Judge Rick R. Roberts
Argued and submitted January 29, 2020; opinion issued April 14, 2020

Attorneys: D.N. was represented by Amy E. Lowe of the public defender's office in St. Louis, (314) 340-7662; the state was represented by Garrick Aplin of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man found to be a sexually violent predator appeals his civil commitment to the department of mental health. In a unanimous decision written by Judge W. Brent Powell, the Supreme Court of Missouri affirms the judgment. The circuit court did not abuse its discretion in disallowing the precise age of child victims to be disclosed during jury selection, nor did its jury instructions prevent a unanimous verdict. The man cannot establish his counsel was ineffective, he failed to preserve other claims for appellate review, and inaudible portions of the trial's audio recording did not deprive him of meaningful review.

Facts: D.N. pleaded guilty to sexual abuse and sentenced to 15 years in prison. He had prior convictions for indecent conduct and contact with a minor and sodomy, and there were additional allegations of sexual misconduct for which he was not prosecuted. While in prison, he twice completed the state's sex offender treatment program. Prior to his release, the state filed a petition for his civil commitment to the department of mental health as a sexually violent predator. Following a trial, the jury unanimously found D.N. met the criteria for a sexually violent predator, and the circuit court committed him to the department of mental health for control, care and treatment. D.N. appeals.

AFFIRMED.

Court en banc holds: (1) The circuit court did not abuse its discretion in making reasonable restrictions during jury selection of the precise, detailed inquiry regarding the age of D.N.'s child victims. D.N. had sufficient opportunity to explore any potential bias within the jury panel because of the tender age of the victims. Both sides disclosed that D.N.'s prior conduct included offenses against children, and D.N.'s counsel referred to "young," "younger" and "small" "kids" in inquiring whether potential jurors would be biased against D.N.

(2) D.N. failed to preserve his claim that the circuit court erred in excluding testimony from a department of mental health psychologist about D.N.'s future risk of reoffending, and he failed to make a facial showing of manifest injustice warranting appellate review.

(3) The circuit court's verdict-directing instruction did not violate D.N.'s statutory right to a unanimous verdict. The statute requires a jury to find only the existence of a mental abnormality that increases the offender's likelihood of committing predatory acts of sexual violence; it does

not require unanimity as to the abnormality's precise nature. A non-unanimous verdict is not possible in this case because the state did not present evidence of multiple mental abnormalities.

(4) D.N. cannot establish his counsel was ineffective in failing to object to the credentials of a report's author under either potential standard for determining ineffective assistance of counsel. State law defines a licensed psychologist to include a person with a provisional license to practice psychology in Missouri; D.N. concedes the author had such a provisional license when she wrote the report, during the probable cause hearing and at trial; and counsel was not ineffective for failing to make an objection lacking merit, regardless of what standard is used.

(5) D.N. failed to preserve his claim that potential jurors intentionally failed to disclose a bias against him or his family, and he failed to present evidence any such person served on his jury. Any judgment as to this point would be mere speculation.

(6) Nothing in the record shows D.N. failed to receive a meaningful hearing or was prejudiced by ineffective assistance of counsel – regardless of what standard is used – for failure to investigate the jury pool or move to change venue. D.N. fails to establish what steps a reasonable attorney would have taken to investigate bias or that an investigation would have revealed bias, and any alleged bias in the jury pool was addressed effectively during jury selection.

(7) Thorough review of omissions in the transcript resulting from indiscernible portions of the trial's audio recording do not prejudice D.N. or deprive him of meaningful appellate review. From context, the indiscernible portions do not appear to involve any of D.N.'s points on appeal or other issues warranting review.